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IN THE

United States Circuit Court

of Appeals

FOR THE NINTH CIRCUIT.

In the Matter
of
The Application of John Dennett, Jr., et al., for a Writ of Mandamus, directed to the Honorable William H. Sawtelle, District Judge of the United States District Court for the District of Arizona, and directed to said District Court.

Brief of the Petitioners

BRIEF

On Motion for Leave to file Petition for Writ of Mandamus and for an Order to Show Cause.

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The Arizona State Press

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BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE APPLICATION FOR WRIT OF MANDAMUS.

This is a Motion for Leave to file an Application for a Writ of Mandamus, directed to the

United States District Court for the District of Arizona, and to the Honorable William H. Sawtelle, as Judge thereof, to compel said Court and Judge to expunge from the Records of said Court the Order or Decree made and entered in said Court in the Cause of Charles W. Clark, Complainant, against the Arizona Mutual Savings and Loan Association, and the Arizona Trust Company, on March 12, 1914, and to prohibit said Court and Judge from proceeding further in said Cause contrary to and in violation of the terms of the final Decree in said Cause of February 27, 1913.

On February 27, 1913, a final decree, Exhibit 8 annexed to the petition herein, was entered and enrolled in the United States District Court for the District of Arizona, in a minority stockholders' suit entitled as stated above (fols. 18, 265).

The October, 1912, term, at which the decree was entered and enrolled, expired April 5, 1913 (fol. 27).

On July 15, 1913, after the expiration of said term and while the decree of February 27, 1913, stood unappealed from and unreversed, the persons named in Exhibit 10, annexed to the petition herein, moved to intervene in said cause and to vacate said decree (fols. 29-30).

The Court and the Honorable Judge thereof granted the motion, vacated the decree of February 27, 1913, and entered an entirely different decree in its place, notwithstanding the protest of the petitioners herein. This new decree was dated and entered March 12, 1914, and substan-

tially affects, modifies and varies the rights of the petitioners acquired by said prior decree (fols. 34-37, 377-384).

It is to annul and expunge from the records of the District Court this decree of March 12, 1914, as a nullity, and to reinstate the decree of February 27, 1913, and to prohibit further proceedings inconsistent therewith that these proceedings are brought (fols. 54-55).

Since it appears from the record and from the authorities hereafter cited that the decree of February 27, 1913, is not void and that the decree of March 12, 1914, is a nullity, it follows that the petitioners are entitled to relief by manudamus, since no other adequate remedy exists.

POINT I.

THE DECREE OF FEBRUARY 27, 1913, IS NOT VOID.

It is not disputed that a diversity of citizenship between the complainant and the defendants exists and that a controversy in which the requisite amount was involved was presented by the pleadings and the proof, and that this was the sole basis of Federal jurisdiction (fols. 9-10, 67-70).

It also appears that the court acquired jurisdiction of the person of the defendants by the service of process and by the appearance of each defendant (fols. 13, 16). The cause alleged in the bill

was obviously one of equitable cognizance in which the court had jurisdiction of the subject matter (fols. 11-13).

The suit, as already indicated, was a minority stockholders' suit, wherein the chief relief sought was a restoration of the property of the Loan Association to the end that by and through the medium of its receiver, its assets might be distributed to its stockholders (fols. 11-13, 109-113). The bill, however, recognized the inherent difficulties which would inevitably be encountered in the literal enforcement of such relief and expressly alleged that since the transfer of the Loan Association assets to the Trust Company a confusion and intermingling of the assets of the two companies had taken place to such an extent that it was difficult to separate them, and in addition to the prayer for the specific relief, above referred to, the complainant prayed for general relief in the premises (fols. 99-101, 111-112).

The petitioners, mentioned in Exhibits 2, 3, 4, and 5, who intervened before the trial, prayed for substantially the same relief as the original complainant, save that having been induced by fraud to exchange their stock in the Loan Association for stock of the Trust Company, they also prayed that their stock in the Loan Association be restored to them (fols. 156-161, 180-185, 199-204, 219-224). They all likewise prayed for general relief (fols. 161, 185, 204, 224).

When the cause came on for trial the utter impossibility of enforcing a restoration of the property in kind became and was manifest. Much of

the Loan Association's property had been reduced to cash and the proceeds dissipated by the officers of the Trust Company (fols. 21-22, 278-279).

But these facts naturally did not warrant a dismissal of the litigation before the court, merely because the interveners could not secure the particular relief they had prayed for, or because, not having been able to foresee the exact situation as it would exist at the time of trial, the litigants had failed to pray for the specific relief which on the facts could be lawfully accorded to them.

Consequently, the learned court, as constituted at the time of trial, adjusted the equities presented as best it could. The court realized that even at the time of trial only a minority of the former stockholders of the Loan Association were opposed to the absorption of the Loan Association by the Trust Company and, that however fraudulent the representations made to the interveners then before the court might have been, the court could not assume that the other former stockholders of the Loan Association who now appear by Exhibit 10, annexed to the petition herein, were similarly deceived, or even if they were so deceived, that they were dissatisfied with the transactions whereby they surrendered their status as Loan Association stockholders and became preferred stockholders in the Trust Company, and the latter company absorbed the assets of the former. Any such assumption would have been particularly unwarranted, since the absorption took place nearly two years before the trial and the proceedings then before the court had been begun some seven months before (fols. 11, 17).

Moreover, a comparison of the petitioners in Exhibit 2 and those named in Exhibits 9 and 10, shows that nineteen of the ninety-seven stockholders of the Trust Company, formerly stockholders of the Loan Association, who, long after the entry of the final decree, are seeking admission to the litigation by means of Exhibit 10, were at the commencement of the litigation parties to the record, but had voluntarily withdrawn from the proceedings as early as August, 1912, and since that time had made no effort to return to it until April and July, 1913 (fols. 119, 305, 338-341).

All parties interested in the proceedings were, however, represented therein. The complainant and the interveners represented all the stockholders of the Loan Association, having representative character to bind all those of the same class. (Equity Rule 38, Richmond vs. Irons, 121 U. S. 27; Lamar vs. Hall, 129 Fed. 79, 83). The stockholders of the Trust Company, including those attempting to intervene now by Exhibit 10, were represented by the Trust Company.

The decree of February 27, 1913, expressly refrained from any adjudication as to the validity of the transaction between the two companies except as to the interveners then before the court, and the stockholders of the Loan Association (fols. 278-282). The rights of these persons were ascertainable with substantial accuracy and were enforced in a manner which would not work unnecessary hardship to the Trust Company or needlessly prejudice or injure its innocent creditors or its stockholders.

The learned court took the view, which is amply

supported by the authorities, that the insolvency of the Loan Association terminated the contract between it and its members. (Sullivan vs. Stucky, 86 Fed., 491, 492. Lewis vs. Clark, 129 Fed., 570, 574. Towle vs. American, etc., Society, 61 Fed., 446, 447. Mutual Loan Association vs. Tyre, 81 Atl., 49, 51). Nothing, therefore, remained "but to wind up the Association in such a manner as to do equity to its creditors, its debtors and its stockholders." (Mutual Loan Association vs. Tyre, supra at page 51).

To this end the court decreed that all the stockholders of the Loan Association, including those who by the decree were restored to their rights as such, receive pro rata the amount they had paid in to the failing enterprise. As the stockholders of the Association were its only creditors it was not necessary to protect this class any further (fol. 13). The surrender by the stockholders of the benefits of their contracts with the Association, which promised them at the maturity thereof approximately $1,000 for every $600 paid in, and the loss of interest on their payments was regarded by the court as a sufficient contribution to the losses of the enterprise which an equitable adjustment of their rights with those of the Trust Company required them to make (fols. 267-269, 270-275, 284-288). The court regarded the Trust Company as a constructive trustee for the benefit of the stockholders of the Loan Association (fol. 283). As between the stockholders of the Loan Association as beneficiaries of this trust and the creditors and stockholders of the trustee, the equities of the former were so far superior that the court might have decreed that all of the Loan Association's assets and such other property

as the trustee had inseparably mingled with them be applied to the satisfaction of the claims of the beneficiaries. (National Bank vs. Connecticut Mutual Life Insurance Company, 104 U. S. 54, 66, 67. Smith vs. Mottley, 150 Fed., 266, 268. Southern Pine Company vs. Savannah Trust Company, 141 Fed., 802, 808. Erie Railroad Co. vs. Dial, 140 Fed., 689, 691. Smith vs. Township, 150 Fed., 257, 261.)

But the court was not bound to afford this drastic remedy. Observing the equitable principal applicable to the situation before it, namely, that a court will not grant a benefit in such a manner as to cause a great injury where the rights of the complaining party can be amply protected without prejudice to the rights of others affected, the court declined to adopt such a course.

Instead the Trust Company was permitted to continue its business in an effort to allow it to survive, if it could, and work out the surplus remaining after the payment of the liens created by the decree of February 27, 1913, for the benefit of its creditors and stockholders (fols, 281-282, 294-300).

As was said by Judge Severens in Erie R. Co. vs. Dial, 140 Fed., 689, at page 691:

> "In a common-law court this might, as between the owners and the trespasser, have given title to the owners of the whole mass of tires, if they were indistinguishable. But a court of equity, for the purpose of saving to creditors that value which attached to the things before

owned by the trespasser, will forbear to enforse a confiscation, and, instead, will accord a lien to the owner upon the mass for the value of the things converted. We had occasion to consider this subject in Holder vs. Western German Bank, 136 Fed., 90, where we held * * * that, where the tort-feasor had mingled the property of the owner with his own, a lien would attach to the mass pro tanto."

Smith vs. Township, 150 Fed. 257, 261.

The receivership decreed was not a general receivership as to the Trust Company. Its purpose was to collect out of all of the assets of both companies a sum sufficient to pay the liens created by the terms of the final decree and thereafter to cause the surplus to be paid to the Trust Company for the benefit of those who are lawfully entitled thereto (fols. 296-298).

It was long after this decree was made and not until July 12, 1913, that the Farmers & Merchants Bank of Phoenix recovered a judgment of $18,500 against the Trust Company (fols. 38). By that time the hopelessness of the situation of the stockholders of the Trust Company as such, was apparent. Within three days after the recovery of that judgment Exhibit 10, annexed to the petition herein, was filed in the court below for the purpose of nullifying the decree of February 27, 1913, and to allow the ninety-seven preferred stockholders of the Trust Company mentioned therein to share in the benefits obtained by the stockholders of the Loan Association (fols. 338-341, 356-364). Subsequently that decree was, as stated above, modified in very

substantial respects so as in effect to vacate it and to make it an entirely different decree on the alleged ground that the court had no jurisdiction to grant it (fols. 376-384).

The method of adjustment of the rights of the parties adopted by the learned court upon the trial of the cause in February, 1913, violated no fundamental right or equity and resulted in equality. This method did not ruthlessly or unnecessarily destroy the rights of innocent parties not before the court, but whose rights were inevitably affected nevertheless, that is to say, the creditors of the Trust Company; but did supply an efficient, expeditious and economical means of administering the estate of the insolvent.

All of the former stockholders of the Loan Association who had elected to remain stockholders of the Trust Company, were represented before the court by the Trust Company (fols. 26). All of the stockholders of the Loan Association either intervened and were represented by their attorney, or their rights were fully protected on an equality with the other stockholders by the decree, and all have accepted its benefits (fols. 19-20, 22-26, 43-44).

The decree has been executed by the declaration and payment of a dividend and in other substantial respects (fols. 37-38).

During the time in which it could lawfully have been the subject of review in the Circuit Court of Appeals for this Circuit, no steps were taken to that end. The time so to review the decree expired and the decree stood unreversed. The term

at which the decree was rendered lapsed and came to an end, the parties on both sides received and accepted its benefits, and all the while the petitioners named in Exhibit 10 remained inactive (fols. 26, 27, 30, 37-38, 41).

This is the decree which has been nullified and swept aside by the learned court below as at present constituted.

The learned court below concedes that a decree which is responsive to the pleadings and rendered in due course of the court's jurisdiction is beyond the power of the same court to modify or change after the term at which it is rendered, "but," says the learned court, " it does not follow that because this is so the court may not set aside or modify a judgment which is not of such a character (fols. 373-374)."

It appears from an inspection of the so-called decree of March 12, 1914, that the sole ground upon which the learned court below based its annullment of the decree of February 27, 1913, is the assertion that the decree was void for want of jurisdiction (fol. 373-374). By this objection the learned court did not question the existence of the diversity of citizenship or of the amount in controversy requisite to confer jurisdiction upon a Federal court, nor was its decision based upon any want of jurisdiction over the person or even of the subject matter involved, but upon the misapprehension that errors of law had been committed in the decree itself, which rendered the decree void for want of jurisdiction, and which it became the court's duty to review, revise and correct (fols. 373-384).

Thus the first ground of invalidity is said to be that the decree is not responsive to the pleadings in that the court vested title in the Trust Company and gave the Loan Association stockholders a lien thereon without any specific prayer in the bill or intervening petitions for such relief and the startling non sequitur is asserted that the decree is consequently void for want of jurisdiction (fol. 371).

The nature of the objection to the decree in this respect appears to be that because the court had jurisdiction and power to grant full relief by complete restoration of the Loan Association properties, a decree which did less by confirming title already vested in the Trust Company and awarding the complainant and interveners a sum of money and giving them a lien upon the property to securs its payment, is void for want of jurisdiction. But this objection loses sight of the fact that the complainant, interveners and remaining stockholders of the Association were a minority of the stockholders of the Association as it existed prior to the transfer of its assets, and were therefore not the only parties to be considered in determining what should equitably be retransferred to the Association (fol. 24).

The decree was, however, responsive to the pleadings and to the proof, with or without the prayer for general relief contained in the bill, and the relief granted was entirely consistent with the relief prayed for.

As we have seen above, granting a lien on the mass where the complainant might have the whole is within the power of a court of equity. (Erie R. Co. vs. Dial, 140 Fed., 689, 691. Smith vs. Township, 150 Fed., 257, 261).

In Jones vs. Mo. Edison Electric Co., 144 Fed., 765, at page 778, Circuit Judge Sanborn said:

> "Nor is the suggestion that the complainant may not recover the value of his stock in this suit in equity because such a recovery would be inconsistent with his repudiation of the contract of consolidation and because he has not prayed for it, very material. The first prayer of the bill is for the restoration of its property to the Edison Company and this is in effect a restoration to the complainant of his share of it. Now, as the court may, under this prayer, rehabilitate the Edison Company, it may do less. It may grant a decree nisi, a decree that all its properties, powers and franchises be restored to the Edison Company unless within a certain time the defendant pay to the plaintiff and those who join him the value of their share of the property transferred to the Consolidated Company. Such a decree would be consistent with the repudiation of the contract of consolidation and with the first prayer in the bill."

Many authorities recognize the right of Courts of Equity, especially in stockholders' suits, to render any decree which does substantial justice between the parties before it, so long as the decree relates to the subject matter involved, irrespective of the specific relief prayed for in the bill.

In Beling vs. American Tobacco Company, 72 New Jersey Eq., 32, 44, a suit brought by a minority stockholder to set aside the merger of the American Tobacco Company with certain other companies, resulted in the decree of the Chancel-

lor that the complainant should have the cash market value of his stock at the time of consolidation with all dividends which could possibly be declared on it up to the time of the expiration of the charter of the company in which he was a stockholder; or in the alternative, if the complainant did not see fit to accept such relief, that his bill be dismissed without prejudice to his action at law. The complaint in this cause contained no prayer for such relief.

See also Backus vs. Brooks, 195 Fed., 452, 454.

In the case at bar, as has already been stated, there was not only an allegation that the property of the Loan Association had been mingled with the property of the Trust Company in such manner as to be separable with difficulty, but there was also a prayer for general relief (fols. 100-101, 111). It was also clear from the allegations of the bill and intervening petitions, that the equities of the complainant, interveners and other stockholders of the Association, though paramount, were not the only ones involved (fols. 87-88, 151-154). Clearly, therefore, the relief granted was within both the specific and the general prayer for relief.

In Walden vs. Bodley, 14 Pet., 156, Justice McLean said at page 164:

"The courts have, by the bill, answer and evidence, the equities of the parties before them; and, having jurisdiction of the main points, they may settle the whole matter. A court of equity cannot act upon a case which

is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the court shall adopt in giving relief. Under the general prayer for relief, the court will extend relief beyond the specific prayer and not exactly in accordance with it. Where a case for relief is made in the bill, it may be given, by imposing conditions on the complainant, consistent with the rules of equity, in the discretion of the court."

In Underground Elec. Ry. Co. vs. Owsley, 169 Fed., 671, the bill was by a creditor for the appointment of a receiver of a decedent's estate and its administration. It was held that the Federal Court could not administer the estate as it was pending in a state probate court, but it would appoint a receiver to preserve the estate pending the probate proceedings. Judge Ward said at p. 675:

"It must be admitted that the bill does pray for the administration of the estate. As, however, it contains a prayer for general relief, the court is competent to give any relief consistent with the case made out in the bill, even if it is more or less or different from the relief prayed for."

In Lockhart vs. Leeds, 195 U. S., 427, the plaintiff's bill prayed that the location of a mining claim by the defendants be declared void, and that the plaintiff may have possession of the claim, and then prayed for relief generally. It was held that under the general prayer the court could decree that the title in the defendant was valid, yet by reason of the fraud set forth in the bill, was

subject to a constructive trust in favor of the plaintiff. Mr. Justice Peckham said at page 436:

> "There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief and upon a somewhat different theory from that which is advanced under one of the special prayers."

See also Haggart vs. Wilczinski, 143 Fed., 22, 28; London & S. F. Bank vs. Dexter, 126 Fed., 593; Watts vs. Waddle, 6 Pet., 389, 402; Tyler vs. Savage, 143 U. S., 79, 97; Sage vs. Central Ry. Co., 99 U. S., 334, 342; Waterman vs. Canal Louisiana Bank, 215 U. S., 33, 45; Stevens vs. Gladding, 17 How., 447, 455; Tayloe vs. Merchant's Fire Ins. Co., 9 How. 390, 405; David vs. McRae, 183 Fed., 812, 814, af'd. 184 Fed., 988; Hayward vs. McDonald, 192 Fed., 890; Patrick vs. Isenhart, 20 Fed., 339; Dick Co. vs. Fuller, 198 Fed., 404, 406; Wilson vs. Plutus U. Co., 179 Fed., 317; Rexford vs. Southern W. Co., 208 Fed., 295, 316.

Again it is asserted that the decree was subject to vacation by the learned court below because in the rendition of the decree of February 27, 1913, the court had proceeded without the assistance of a Master. But the court saw no necessity to plunge the estate into the expense incident to proceedings before a Master, to delay its administration, settlement and distribution to no

useful purpose when the court was amply able to make the decree which did substantial justice to the parties. Moreover, the avoidance of the proceedings before the Master was in accord with the spirit of the equity rules last promulgated by the Supreme Court, which contemplate the trial of equity cases wherever possible before the court and the abandonment of the cubersome and expensive proceedings before masters required by the earlier procedure (Equity Rule 46).

The decree of February 27, 1913, was attacked in another respect. Even its justness and its equity were made the subject of review and revision by the learned court below and although no proof was taken upon the subject, the learned court assumed that the stockholders of the Loan Association had been relieved of participating in any of the losses the Loan Association had sustained and that such stockholders were given a lien to the exclusion of other stockholders, by which the court meant the stockholders of the Trust Company named in Exhibit 10 (fol. 373). As we have already pointed out, this is an obvious misapprehension.

But not one of these objections to the decree of February 27, 1913, presented any question of jurisdiction. It cannot intelligently be disputed that when the court made the decree of February 27, 1913, there was pending before it for determination a justiciable controversy which it had the power to decide and its decision of the cause, however, erroneous, was nevertheless just as valid and binding as though the decree had received the sanction of this learned court.

In Hine vs. Morse, 218 U. S., 493, Mr. Justice Lurton said on page 505:

"The Supreme Court of the district has jurisdiction over the subject matter, the res. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If then jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we cannot consent. If the court was one of general and not special jurisdiction, if under its inherent power, supplemented by statutory enlargement it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper Appellate procedure, But this judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity." Again at page 509, the court said:

"The line between a judgment which is a plain usurption of jurisdiction and one which is merely erroneous and reviewable only by seasonable appeal is a plain one. The case in hand falls, in our judgment, within those which are merely reversible upon appellate proceedings, and the judgment decreeing the sale and appointing Waggaman as trustee to make the sale, is not a nullity."

Quoting from Vorhees vs. Bank, 10 Pet., 449, 474, the court continued:

"The line which separates error in judgment from usurpation of power is very definite and is precisely that which denotes the cases where a judgment or decree is reversible only by Appellate Court or may be declared a nullity collaterally when it is offered in evidence in an action concerning the matter adjudicated or purporting to have been so. In the one case, it is a record meriting absolute verity; in the other, mere waste paper; there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit; and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution.

It follows that the decree of February 27, 1913, was not and is not void.

POINT II.

THE DECREE OF MARCH 12, 1914, IS A NULLITY.

After the expiration of the term at which a decree in equity is entered, the court has no jurisdiction to vacate or modify it, except for fraud, want of jurisdiction to render it, or to change it for clerical error. A wealth of judicial authority supports this elementary proposition.

In Sibbald vs. U. S., 12 Pet., 488, Justice Baldwin, at p. 492, said:

"No principle is better settled, or of more

universal application, than that no court can reverse or annul its own final decree or judgment for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes * * or to reinstate a cause dismissed by mistake * * from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing. Bills of review, in cases in equity, and writs of error *coram vobis*, at law, are exceptions which can not affect the present motion."

(In re Metropolitan Trust Co., 218 U. S., 312, 320; Cameron vs. McRoberts, 3 Wheat, 590).

The sole ground upon which the learned court below based his vacation of the decree of February 27, is a supposed lack of jurisdiction in the court to grant that decree. But this contention on the part of the learned judge, as we have shown, proceeds entirely from a misconception and a misapprehension of the difference between a void decree and one which is merely erroneous.

Since, as we have shown, the decree was not even erroneous, much less void, it necessarily follows that the learned court below assumed and exercised a power which neither the learned judge nor the court over which he presides had power or authority to exercise.

It follows, therefore, that this exercise of assumed authority, rendered the decree of March 12, 1914, absolutely void and a nullity.

It is a matter deeply to be regretted that the

learned court below, notwithstanding the citation to it of many authorities, including in re Metropolitan Trust Company, 218 U. S., 312, a case involving the identical principal here presented, and notwithstanding the earnest protest of the petitioners against the course pursued, so entirely misapprehended and misconceived the situation that the final decree of February 27, 1913, was vacated.

Applications for mandamus are not willingly resorted to by counsel who entertain only the highest respect for the learned court which made the decree here complained of, but the misapprehension of the learned court was so serious to the rights of a large number of litigants that no other alternative was presented to the parties adversely affected thereby and an urgent necessity exists for the granting of the relief prayed for herein.

The decree of February 27, 1913, held that the transfer of the assets of the Loan Association was void as to the interveners and other non-consenting stockholders; that the assets of the two companies had been so intermingled that it was impossible to separate them and that the interveners had been induced to exchange their stock in the Association for stock in the Trust Company by fraudulent misrepresentations. These interveners were restored to their status as stockholders of the Association, and the Trust Company was vested with the title to all the property, subject, however, to liens in favor of the interveners and all other stockholders of the Association for the amounts they had paid in on their stock. A permanent receiver was appointed for the Trust Company with duties to sell so much of

its properties as would be required to pay certain allowances and expenses and the liens just mentioned and to pay the surplus to the Trust Company. The same person was also made permanent receiver of the Association with the usual powers. In summary form this is a statement of the important provisions of the decree of February 27, 1913, which was made by the learned court after a trial (fols. 277-301).

The decree of March 12, 1914, by which the former decree was vacated, was made by a different judge *without a trial* and is an entirely different decree, as will be seen by the following summary statement of its provisions.

The former property of the Loan Association was ordered restored to it. This had been declared an impossibility by the former court after a trial. All property derived from the use and investment of Loan Association property was ordered restored to it. The cause was ordered referred to a Master to state the account between the two companies after a hearing, to report as to the exact amount due to each stockholder by the Association, to give 30 days' notice by publication to all stockholders to make their claim, including the petitioners who had already established and proved their claim once upon a trial in open court; to report on the priorities and equities of all persons interested in the property of the Association, to report whether there is any property of the Association in the hands of third parties and whether it can be recovered. The demurrers to the petition of intervention were overruled and the parties named in Exhibit 10 were allowed to intervene and present their claims

to the Master. A general receiver of the two companies was appointed. All other questions were reserved until the coming in of the Master's report (fols. 378-383).

It is very clear, therefore, that the decree of March 12, 1914, materially changed the provisions of the decree of February 27, 1913, and in reality vacated and annulled it.

As the court was without jurisdiction to vacate or substantially modify the decree of February 27, 1913, the decree of March 12, 1914, is void and a mere nullity.

POINT III.

THE PETITIONERS ARE ENTITLED TO RELIEF BY MANDAMUS IN THIS COURT.

On April 13, 1914, the petitioners made application to the Supreme Court of the United States for leave to file a petition for a mandamus or prohibition, or both, directed to the court below and the judge thereof, requiring the decree of March 12, 1914, to be expunged and the reinstatement of the decree of February 27, 1913.

On April 20, 1914, the application was denied without opinion.

Counsel for petitioners did not discover the error in submitting the application to the Supreme Court instead of to this court until after the denial of the application.

Had this case presented a question of jurisdiction peculiar to a National Court the application would properly have been addressed to the Supreme Court. (Judicial Code, sec 234, 262, Re Metropolitan Trust Company, 218 U. S. 312; Matter of Dunn, 212 U. S. 374; Virginia vs. Rives, 100 U. S. 313; Virginia vs. Paul, 148 U. S. 107; Kentucky vs. Power, 201 U. S. 1.)

But the question of jurisdiction presented here is not one involving the jurisdiction of the district court as a Federal Court but simply its general authority as a judicial tribunal, and could not, therefore, even if the decree of March 12 were final, be certified to the Supreme Court. (Louisville Trust Co. vs. Knott, 191 U. S. 225, 233; Fore River S. Co. vs. Hagg, 219 U. S. 175; Darnell vs. Illinois Central R. R. Co., 225 U. S. 243; Bogart vs. Southern Pacific Co., 228 U. S. 137, 148.) This consideration is decisive on this question as mandamus to other courts is in the nature of appellate jurisdiction.

Ex parte Crane, 5 Pet. 190, 193.

Where the jurisdictional question involved is one common to all courts and does not include the question of the jurisdiction of the court as a Federal Court, then the application should be addressed to the Circuit Court of Appeals and not to the Supreme Court.

In Barber Asphalt Co. vs. Morris, 132 Fed. 945, Judge Sanborn said at page 952:

> "The power to issue writs of mandamus was granted to the Supreme Court by Section 688

of the Revised Statutes, but the limit of the power of that court and of this is the same. Each court has jurisdiction to issue the writ to a subordinate court or judge in the exercise of and in aid of its appellate jurisdiction. It is without power to issue it in a case which is not reviewable in that court by appeal or writ of error challenging its final decision, or otherwise, or to issue it to create a case for the exercise of its appellate jurisdiction."

In Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed. 524, Judge Cochran said at page 525:

"In view of these decisions it would seem that * * * it is not proper to make the application to the Circuit Court of Appeals * * * to interfere by mandamus with the action of a Circuit Court of the United States where the question involved relates to its jurisdiction as a Circuit Court of the United States.

"If so, the only case in which that court can have power to interfere by mandamus with the action of the Circuit Court, where the question involved relates to its jurisdiction, is where the question is as to its jurisdiction as a judicial tribunal of original jurisdiction. * * * The question here is as to the jurisdiction of the lower court as a tribunal of original jurisdiction. There is nothing, therefore, in the nature of the case itself against this court's power to grant the mandamus sought. * * * The sum of these expressions is that the writ will not be so issued when the action of the Circuit Court is within its jurisdiction. It will

be issued when it is not up to or goes beyond its jurisdiction and there is no other adequate remedy."

(U. S. vs. Swan, 65 Fed. 647, 649; In re Beckwith, 203 Fed. 45; McClellan vs. Carland, 217 U. S. 268, 279.)

In the case at bar the question directly involved is whether the district court had jurisdiction to modify and vacate its final decree after the end of the term. The only other jurisdictional question raised and involved in this inquiry is whether the former decree was beyond the jurisdictional powers of the court to grant. The reasons given by the District Court for holding this former decree void are that it was not responsive to the pleadings and was inequitable. If these objections raise any question of jurisdiction it is clearly not one of the court's jurisdiction as a Federal Court, but as a court of equity. The only other question involved in this inquiry is whether the decree of March 12, 1914, was final or not. There can be no doubt, therefore, that mandamus lies in this case from the Circuit Court of Appeals and not from the United States Supreme Court.

The jurisdiction of the Circuit Court of Appeals to issue writs of mandamus is derived from Section 262 of the Judicial Code of the United States which provides as follows:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the Circuit Court of Appeals, and the district courts shall have power to issue all writs not specifically provided for

by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Where mandamus is in aid of the appellate jurisdiction of the Circuit Court of Appeals, there is no doubt of the court's power to issue it. (U. S. vs. Swan, 65 Fed. 647, 648; Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed. 524; Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 945, 952; McClellan vs. Carland, 217 U. S. 268, 279; Barnes vs. Lyons, 187 Fed. 881.) It is not at all necessary that an appeal should actually be pending or that the appellate jurisdiction should actually have been invoked to support an application for a mandamus. The test of appellate jurisdiction in the exercise and aid of which the court of appeals may issue write of mandamus is the existence of jurisdiction, not its prior invocation.

In Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 945, Judge Sanborn said at page 956 that the test is:

> "The existence of a right to review by a challenge of the final decisions or otherwise of the cases or proceedings to which the applications for the writs relate and not the prior exercise of the right by appeal or by writ of error."

See also McClellan vs. Carland, 217 U. S. 268, 279-280.

In the case at bar appellate jurisdiction exists in this court to review any final decree which may

be rendered. If mandamus were not prayed for herein proceedings would be continued under the decree of March 12, 1914, until eventually a final decree would be entered finally adjudicating the rights of all parties. From such a final decree appeal would lie to this court. As we shall show later, this appeal would not be an adequate remedy and a proper case is therefore presented for the issue of a writ of mandamus by this court in exercise of its appellate jurisdiction.

The fact that the appellate jurisdiction is invoked by the application for the writ and, if granted, will settle the controversy as to these parties without further appeal being necessary, does not affect the right of the court to issue the writ of mandamus. There is nothing in Sec. 262 of the Judicial Code that would prevent the issue. On the contrary this court is authorized by the provisions of that section to issue the writ in exercise of its appellate jurisdiction. Moreover, the authorities clearly show that this court has power to issue the writ even where appellate jurisdiction is invoked by the application alone.

In Barnes vs. Lyons, 187 Fed. 881 (Circuit Court of Appeals, Ninth Circuit), while the court denied the writ on the ground that the lower court had jurisdiction, Judge Wolverton said, at page 884:

> "The principle applicable here, tersely stated, is mandamus will lie to require an inferior court to restore an attorney as a practitioner when the court has exceeded its jurisdiction in striking his name from the roll."

In the Barnes case the court cited as applica-

ble to the Circuit Court of Appeals the principle laid down in ex parte Crane, 5 Pet. 190, by Chief Justice Marshall, at page 193, as follows:

> "A mandamus to an officer is held to be the exercise of original jurisdiction; but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction."

See also Judge Sanborn's review of the authorities in Barber Asphalt Pav. Co. vs. Morris, 132 Fed. 945, 952-956, and In Re Metropolitan Trust Co., 218 U. S. 312; Virginia vs. Rives, 100 U. S. 313; Virginia vs. Paul, 148 U. S. 107; Kentucky vs. Power, 201 U. S. 1.

The real inquiry is, should this court exercise that jurisdiction and grant the relief prayed for.

It is well settled that mandamus will issue unless the petitioners have an adequate remedy by appeal. (United States vs. Swan, 65 Fed. 647, 649; in re Winn, 213 U. S. 458, 466; re Metropolitan Trust Co., 218 U. S. 312, 321.)

The appealability of the decree of March 12, 1914, depends upon whether it possesses the characteristics of finality. If it is final it is appealable to this court (Judicial Code, Sec. 128). If not final, it could be reviewed only after the entry of a final decree. That the latter remedy is not adequate appears clearly from the authorities last cited.

Standing alone the decree of March 12, 1914, is clearly not final, but merely interlocutory. In itself, this decree possesses none of the attributes

of finality. The mere fact that the decree of March 12, 1914, vacates a final decree does not make the new decree final or affect the remedy of mandamus. In the Metropolitan Trust case (*supra*), the later decree vacated a previous final decree, yet mandamus issued.

This aspect of the question determines the issue of the finality of the decree of March 12, 1914, in favor of the proposition that it is not final as to the petitioners. For in determining this question the decree of February 27, 1913, cannot be looked to. The decree of March 12, 1914, cannot be held to derive any attributes of finality from the decree of February 27, 1913. It is true that the decree of March 12, 1914, purports only to "modify" the decree of February 27, 1913; but it is impossible to determine from an inspection of the decree of March 12 in what respect the decree of February 27 is modified and in what respects it is still in force. In reality, the decree of March 12 is not a modification of the former decree at all. The decree of March 12, 1914, is in reality substituted in the place of the decree of February 27, 1913. Actually, the decree of February 27, 1913, so far as its adjudicatory part is concerned, is swept aside and completely nullified. The parts of that decree which remain are obviously not its final attributes; for it is clear from an inspection of the decree of March 12th that the very object of that decree was to deprive the first decree of its final attributes. In fact, an inspection of the decree of March 12, 1914, very clearly shows that the learned court's chief objection to the first decree was that it was beyond the power of the court at the time the first decre was entered to make a final decree.

The nullification of the decree of February 27th is as we have pointed out, accomplished not by a decree which in terms finally adjudicates anything, but what is in fact a mere order which in effect, but not in terms, strips the first decree of its attributes of finality, re-opens the cause and refers to a Master to state the account between the two companies and to ascertain and determine the rights of the parties already finally adjudicated by a competent court, while all other questions are expressly reserved until the coming in of the Master's report.

Such an instrument is not a final decree and consequently is not appealable by direct appeal. (Lodge vs. Twell, 135 U. S. 232; Latta vs. Kilbourn, 150 U. S. 524; Parsons vs. Robinson, 122 U. S. 112; Riddle vs. Hudgins, 58 Fed. 490, 493; Grant vs. Phoenix Ins. Co., 106 U. S. 429; Louisiana Bank vs. Whitney, 121 U. S. 284; Green vs. Fisk, 103 U. S. 518, 154 U. S. 668; Clark vs. Roller, 199 U. S. 541; Tally vs. Curtain, 58 Fed. 4; Pittsburgh, etc., Ry. Co. vs. B. & O. R. Co., 61 Fed. 705; Security Trust Company vs. Sullivan, 77 Fed. 778; Denison & N. Ry. Co. vs. Ranney, 104 Fed. 595).

The proceedings initiated by the decree of March 12th may not terminate for several years and the fact that ultimately the petitioners might be able to review it on appeal from the final decree, when rendered, does not render such a remedy adequate in the sense that its theoretical existence deprives the petitioners of a practical and useful remedy by mandamus. Pending the determination of this matter by a final decree, the fund which the petitioners by their diligence rescued

from the hands of the corrupt officers of the defendants will be impaired and disbursed in fees, constituting the cost of this type of administration, while in the end little will remain for distribution to the litigants.

Such a "remedy" is at least not adequate, and its existence will not defeat proceedings for mandamus.

As this court said in re Winn, 213 U. S., 458, 466:

> "In such a situation the remedy by mandamus is available, although the aggrieved party also be entitled to a writ of error or an appeal.
>
> "Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The writ of mandamus was introduced to supplement the existing jurisdiction of the courts and to afford relief in extreme cases where the law presents no adequate remedy * * *. An appeal or writ of error at the end of long proceedings which must go for naught, is not an adequate remedy."

While we are aware that in re Winn, among other cases, was disapproved by the court in ex parte Harding, 219 U. S. 363, we do not understand that this portion of it met with the court's disapproval.

> See also United States vs. Swan, 65 Fed. 647, 649.

We further respectfully submit that as the Supreme Court of the United States was impelled

to grant this relief in re Metropolitan Trust Co., 218 U. S. 312, so this learned court should grant the same relief here.

In the Metropolitan Trust Co. case the Circuit Court vacated an order made at a prior term under the mistaken belief that the court was without jurisdiction when the order was made.

The Supreme Court granted mandamus to set aside the order which vacated the decree in that cause and held squarely that mandamus is the proper remedy where the court has exceeded its power by vacating a judgment after the term.

The case at bar establishes the existence of a proper instance for the exercise of this remedy, extraordinary though it be, and the facts here presented are identical in principle with those existing in the Metropolitan case and clearly show that the petitioners have been unlawfully deprived of their property and that they are wholly without adequate remedy in the premises unless the court will grant the relief prayed for.

We think it clear that it appears from the face of the record that the learned court below, through a misapprehension of its duties and its authority, has already done and, unless restrained by this Honorable Court, threatens in the future to do serious injury to the rights of the petitioners, and that such acts are not mere erroneous rulings which may be adequately reviewed upon appeal, but are dangerous excesses of authority, destructive of the vested property rights of the petitioners and wholly beyond the court's power and jurisdiction.

Since on the face of the record as a matter of law and not as a disputed matter of fact, the District Court is plainly assuming to act and has acted wholly without jurisdiction, and as the petitioners have no other adequate remedy except by mandamus, from this court, leave to file this application should be granted and the rule prayed for should issue.

Respectfully submitted,

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(With whom John de R. Storey was on the brief.)

Dated San Francisco, May 4, 1914.